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UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

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JULIUS BRADFORD,	Case No. 2:13-cv-01784-RFB-GWF
Petitioner,	
v.	ORDER
TIMOTHY FILSON, <i>et al.</i> ,	
Respondents.	

Introduction

This action is a *pro se* petition for a writ of habeas corpus, pursuant to 28 U.S.C. § 2254, by Julius Bradford, a Nevada prisoner. The respondents have filed a motion to dismiss. In turn, Bradford has filed a motion for evidentiary hearing relative to the motion to dismiss. Both motions are fully briefed and before the Court for resolution. The Court will deny the motion to dismiss without prejudice to the respondents raising the same procedural default defenses in their answer, and the Court will deny the motion for evidentiary hearing as moot, without prejudice to Bradford requesting an evidentiary hearing relative to the merits of his claims, as contemplated by the scheduling order in the case.

Background

Bradford was convicted in 2007, in Nevada’s Eighth Judicial District Court, in Clark County, of first degree murder with use of a deadly weapon and attempted robbery with use of a deadly weapon, and he was sentenced to two consecutive sentences of twenty years to life in prison for the murder with use of a deadly weapon, and two consecutive

1 sentences of two to six years in prison, for the attempted robbery with use of a deadly
2 weapon, to be served concurrently with the life sentences. See Amended Judgment of
3 Conviction, Exhibit 102 (ECF No. 28-15).

4 Bradford appealed. See Appellant's Opening Brief, Exhibit 106 (ECF No. 28-19).
5 The Nevada Supreme Court affirmed Bradford's conviction and sentence on June 30,
6 2009. See Order of Affirmance, Exhibit 111 (ECF No. 29-4). Bradford filed a petition for
7 rehearing, and a petition for en banc reconsideration, both of which were denied. See
8 Petition for Rehearing, Exhibit 112 (ECF No. 29-5); Order Denying Rehearing, Exhibit 113
9 (ECF No. 29-6); Petition for En Banc Reconsideration, Exhibit 114 (ECF No. 29-7); Order
10 Denying En Banc Reconsideration, Exhibit 115 (ECF No. 29-8).

11 Bradford then filed a petition for writ of habeas corpus in the state district court.
12 See Petition for Writ of Habeas Corpus (Post Conviction), Exhibit 123 (ECF No. 29-18).
13 The state district court denied Bradford's petition on May 13, 2011. See Findings of Fact,
14 Conclusions of Law and Order, Exhibit 127 (ECF No. 29-22). Bradford appealed. See
15 Appellant's Opening Brief, Exhibit 147 (ECF No. 32). The Nevada Supreme Court
16 affirmed on July 23, 2013. See Order of Affirmance, Exhibit 154 (ECF No. 34).

17 On May 4, 2012, Bradford filed a second petition for writ of habeas corpus in the
18 state district court. See Petition for Writ of Habeas Corpus (Post-Conviction), Exhibit 138
19 (ECF No. 30-3). The state district court dismissed that petition on July 30, 2012, upon a
20 motion by the State, ruling Bradford's claims to be successive and time-barred. See Order
21 Granting State's Response and Motion to Dismiss Defendant's Petition for Writ of Habeas
22 Corpus (Post-Conviction), Exhibit 141 (ECF No. 31-2). Bradford appealed. See
23 Appellant's Opening Brief, Exhibit 150 (ECF No. 33). The Nevada Supreme Court
24 affirmed on October 16, 2014. See Order of Affirmance, Exhibit 174 (ECF No. 42-3).
25 Bradford filed a petition for rehearing, which was denied. See Petition for Rehearing,
26 Exhibit 175 (ECF No. 42-4); Order Denying Rehearing, Exhibit 186 (ECF No. 62-4).

27 This Court received Bradford's federal petition for writ of habeas corpus, initiating
28 this action, on September 27, 2013 (ECF No. 1). On December 3, 2013, the Court

1 appointed the federal public defender's office to represent Bradford. See Order entered
2 December 3, 2013 (ECF No. 16). With counsel, Bradford filed an amended habeas
3 petition on August 12, 2014 (ECF No. 22).

4 On March 31, 2015, this action was stayed, upon a motion by Bradford, pending
5 Bradford's further exhaustion of claims in state court. See Motion to Stay and Abey (ECF
6 No. 41); Order entered March 31, 2015 (ECF No. 53).

7 Bradford filed a third state-court petition for writ of habeas corpus in the state
8 district court on August 29, 2014. See Petition for Writ of Habeas Corpus (Post-
9 Conviction), Exhibit 172 (ECF No. 42-1). The state district court dismissed that petition on
10 March 25, 2015, upon a motion by the State, ruling Bradford's claims to be time-barred.
11 See Findings of Fact, Conclusions of Law and Order, Exhibit 189 (ECF No. 62-7).
12 Bradford appealed. See Appellant's Opening Brief, Exhibit 193 (ECF No. 62-11). The
13 Nevada Supreme Court affirmed on July 27, 2016. See Order of Affirmance, Exhibit 197
14 (ECF No. 62-15).

15 Back in this Court, the stay of this action was lifted on January 13, 2017, and
16 Bradford filed a second amended habeas petition, which is now his operative petition.
17 See Order entered January 13, 2017 (ECF No. 66); Second Amended Petition for a Writ
18 of Habeas Corpus (ECF No. 67).

19 The respondents filed their motion to dismiss (ECF No. 73) on September 11,
20 2017. Bradford filed an opposition to the motion to dismiss (ECF No. 76) and his motion
21 for evidentiary hearing (ECF No. 77) on November 27, 2017. Respondents filed a reply
22 in support of their motion to dismiss (ECF No. 85) and an opposition to the motion for
23 evidentiary hearing (ECF No. 86), on February 15, 2018. Bradford filed a reply in support
24 of his motion for evidentiary hearing (ECF No. 87) on February 22, 2018.

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1 Discussion

2 In their motion to dismiss, respondents assert that Grounds 1, 2, 9, 11, 13, 14 and
3 15 of Bradford's second amended habeas petition are procedurally defaulted, and
4 therefore subject to dismissal. See Motion to Dismiss (ECF No. 73).

5 In *Coleman v. Thompson*, the Supreme Court held that a state prisoner who fails
6 to comply with the state's procedural requirements in presenting his claims is barred by
7 the adequate and independent state ground doctrine from obtaining a writ of habeas
8 corpus in federal court. *Coleman v. Thompson*, 501 U.S. 722, 731-32 (1991) ("Just as in
9 those cases in which a state prisoner fails to exhaust state remedies, a habeas petitioner
10 who has failed to meet the State's procedural requirements for presenting his federal
11 claims has deprived the state courts of an opportunity to address those claims in the first
12 instance."). Where such a procedural default constitutes an adequate and independent
13 state ground for denial of habeas corpus, the default may be excused only if "a
14 constitutional violation has probably resulted in the conviction of one who is actually
15 innocent," or if the prisoner demonstrates cause for the default and prejudice resulting
16 from it. *Murray v. Carrier*, 477 U.S. 478, 496 (1986).

17 To demonstrate cause for a procedural default, the petitioner must "show that
18 some objective factor external to the defense impeded" his efforts to comply with the state
19 procedural rule. *Murray*, 477 U.S. at 488. For cause to exist, the external impediment
20 must have prevented the petitioner from raising the claim. See *McCleskey v. Zant*, 499
21 U.S. 467, 497 (1991). With respect to the prejudice prong, the petitioner bears "the burden
22 of showing not merely that the errors [complained of] constituted a possibility of prejudice,
23 but that they worked to his actual and substantial disadvantage, infecting his entire
24 [proceeding] with errors of constitutional dimension." *White v. Lewis*, 874 F.2d 599, 603
25 (9th Cir. 1989), citing *United States v. Frady*, 456 U.S. 152, 170 (1982).

26 In response, Bradford argues that he can overcome the procedural default of
27 Grounds 1, 2, 9, 11, 13, 14 and 15, by showing that he is actually innocent within the
28 meaning of *Schlup v. Delo*, 513 U.S. 298 (1995). See Opposition to Motion to Dismiss

1 (ECF No. 76), pp. 3-12. To demonstrate actual innocence to overcome a procedural bar,
2 a petitioner must present “new reliable evidence – whether it be exculpatory scientific
3 evidence, trustworthy eyewitness accounts, or critical physical evidence – that was not
4 presented at trial.” *Schlup*, 513 U.S. at 324. By means of that evidence, and in light of all
5 the evidence in the case, the petitioner “must show that it is more likely than not that no
6 reasonable juror would have convicted him in the light of the new evidence.” *McQuiggin*
7 *v. Perkins*, 569 U.S. 383, 399 (2013), quoting *Schlup*, 513 U.S. at 327; *see also Schlup*,
8 513 U.S. at 329 (“a petitioner does not meet the threshold requirement unless he
9 persuades the district court that, in light of the new evidence, no juror, acting reasonably,
10 would have voted to find him guilty beyond a reasonable doubt”); *House v. Bell*, 547 U.S.
11 518, 538, quoting *Schlup*, 513 U.S. at 327-28 (regarding evidence to be considered).
12 “Based on this total record, the court must make a ‘probabilistic determination about what
13 reasonable, properly instructed jurors would do.’” *House*, 547 U.S. at 538, quoting *Schlup*,
14 513 U.S. at 329. “The Court’s function is not to make an independent factual
15 determination about what likely occurred, but rather to assess the likely impact of the
16 evidence on reasonable jurors.” *House*, 547 U.S. at 538. Meeting this standard “raise[s]
17 sufficient doubt about [the petitioner’s] guilt to undermine confidence in the result of the
18 trial without the assurance that the trial was untainted by constitutional error,” warranting
19 “a review of the merits of the constitutional claims[.]” *Schlup*, 513 U.S. at 317.

20 In addition, Bradford argues that he can overcome the procedural default of
21 Grounds 1, 2, 9, 11, 13 and 14, by showing that ineffective assistance of his state post-
22 conviction counsel was the cause of the defaults. See Opposition to Motion to Dismiss
23 (ECF No. 76), pp. 12-21, citing *Martinez v. Ryan*, 566 U.S. 1 (2012). In *Martinez v. Ryan*,
24 566 U.S. 1 (2012), the Supreme Court ruled that ineffective assistance of post-conviction
25 counsel may serve as cause, to overcome the procedural default of a claim of ineffective
26 assistance of trial counsel. In *Martinez*, the Supreme Court noted that it had previously
27 held, in *Coleman*, that “an attorney’s negligence in a postconviction proceeding does not
28 establish cause” to excuse a procedural default. *Martinez*, 566 U.S. at 15. The *Martinez*

1 Court, however, “qualif[ied] *Coleman* by recognizing a narrow exception: inadequate
2 assistance of counsel at initial-review collateral proceedings may establish cause for a
3 prisoner’s procedural default of a claim of ineffective assistance at trial.” *Id.* at 9. The
4 Court described “initial-review collateral proceedings” as “collateral proceedings which
5 provide the first occasion to raise a claim of ineffective assistance at trial.” *Id.* at 8.

6 And, finally, citing *Ake v. Oklahoma*, 470 U.S. 68 (1985), Bradford argues that, with
7 respect to Ground 15, the Nevada courts’ application of the state procedural bars involved
8 consideration of the merits of the federal constitutional claim, meaning that the procedural
9 ruling was not independent of federal law, rendering the procedural default doctrine
10 inapplicable. See Opposition to Motion to Dismiss (ECF No. 76), pp. 22-30.

11 The Court determines that all the issues raised by the motion to dismiss are
12 intertwined with the merits of Grounds 1, 2, 9, 11, 13, 14 and 15, such that they will be
13 better addressed in conjunction with the merits of those claims, after respondents file an
14 answer and petitioner a reply. Therefore, the Court will deny respondents’ motion to
15 dismiss without prejudice to respondents raising their procedural default defenses in their
16 answer, and without prejudice to Bradford asserting his arguments based on *Schlup*,
17 *Martinez*, and *Ake*, in response, in his reply.

18 As the Court determines that the issues raised by the motion to dismiss will be
19 better addressed in conjunction with the merits of Bradford’s claims, after respondents
20 file an answer and petitioner a reply, the Court will also deny Bradford’s motion for
21 evidentiary hearing with respect to the motion to dismiss, as moot, without prejudice to
22 him moving for an evidentiary hearing when he files his reply to respondents’ answer, as
23 contemplated in the schedule set forth in the order entered on January 13, 2017 (ECF
24 No. 66).

25 **IT IS THEREFORE ORDERED** that respondents’ Motion to Dismiss (ECF No. 73)
26 is **DENIED**.

27 **IT IS FURTHER ORDERED** that petitioner’s Motion for an Evidentiary Hearing
28 (ECF No. 77) is **DENIED**.

IT IS FURTHER ORDERED that respondents shall file an answer, responding to all the claims in petitioner's second amended habeas petition (ECF No. 67) within 90 days from the date of this order.

IT IS FURTHER ORDERED that, in all other respects, the schedule for further proceedings set forth in the order entered January 13, 2017 (ECF No. 66) remains in effect.

DATED this 12th day of April 2018.



RICHARD F. BOULWARE, II
UNITED STATES DISTRICT JUDGE